Supreme Court, U.S.
FILED
JAN 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 663

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, CALIFORNIA CITRUS LEAGUE, WESTERN GROWERS ASSOCIATION, ET AL.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ARMOUR AND COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida.

MOTION TO AFFIRM.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 663

Florida Citrus Commission, Growers and Shippers League of Florida, Florida Fruit and Vegetable Association, Florida Railroad and Public Utilities Commission, California Citrus League, Western Growers Association, et al.,

Plaintiffs-Appellants,

vs.

United States of America, Interstate Commerce Commission, Atlantic Coast Line Railroad Company, Armour and Company, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida.

MOTION TO AFFIRM.

Railroad Appellees, as shown in Appendix A hereto attached, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final decree of the Three-Judge District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT.

This is a direct appeal from the final decree entered September 7, 1956, by a district court of three judges, constituted pursuant to 28 U.S.C. 2284 and 2325, dismissing appellants' complaints which sought to set aside an order made by the Interstate Commerce Commission January 9, 1956, in I.C.C. Docket No. 31342, *Proposed Increased Refrigeration Charges,* 297 I.C.C. 505, authorizing, with certain exceptions, an increase of fifteen percent in the basic charges for refrigeration service within and between all territories.

In *Increased Railway Rates, Fares and Charges, 1946,* 266 I.C.C. 537, 600-602, decided December 5, 1946, the Commission authorized an increase of 15 percent in refrigeration charges; and, in *Increased Freight Rates, 1947,* 270 I.C.C. 403, 461, decided July 27, 1948, it authorized a similar increase. Additional increases in refrigeration charges sought by the carriers were denied by the Commission in *Increased Freight Rates, 1948,* 276 I.C.C. 9, 107-109; *Increased Freight Rates, 1951,* 281 I.C.C. 557, 604-606; and *Increased Freight Rates, 1951,* 284 I.C.C. 589, 639, on the ground that the carriers had not made a showing that the several 15 percent increases authorized in the 1946 and 1947 proceedings were insufficient to compensate them adequately for all costs incident to furnishing the services (276 I.C.C. 9, 109). Thus when proceedings were commenced in Docket No. 31342, refrigeration charges had been increased only 32.25 percent (15% plus 15%) since June 30, 1946, whereas railroad freight rates generally had been increased 78.9 percent since that date. *Increased Freight Rates, 1951,* 289 I.C.C. 395, 396.

In an effort to redress this situation, and to demonstrate that refrigeration costs had been subject to the same inflationary tendencies as other transportation costs, the carriers conducted comprehensive traffic and cost investigations for the full year 1951 which disclosed that refrigeration service was being performed at an annual loss of $11,000,000 to $13,000,000 (Tr. 17-20*), referred to in the Commission's Report as "a deficit in excess of $12,000,000 per annum" (297 I.C.C. 505, 510).

Accordingly, practically all the carriers in the country, by petition filed with the Commission on August 31, 1953, as later amended at the hearing, asked the Commission to permit increases in their refrigeration charges and modify all outstanding orders so that such increases might be made effective. In the petition, the carriers stated that cost studies recently completed by them showed that the cost of performing refrigeration services, on the basis of 1951 experience, exceeded by not less than $12,000,000 the total revenue received; that the increased charges proposed by them would not be in excess of all the costs occasioned by the services plus a reasonable return on investment; and that the proposed charges were essential for the maintenance of adequate and efficient refrigeration services.

The increases proposed by the carriers are shown in detail in Appendix A to the Commission's Report (297 I.C.C. 505, 556-557). Generally, the proposal was to increase by 30 percent, with certain exceptions, the charges published in Section 2 of the Perishable Protective Tariff, and those provided in other sections based thereon, and to increase by specified amounts the charges

* These, and similar figures used herein, refer to appropriate pages of the transcript of testimony in Docket No. 31342.

published in Section 4 of the same tariff. The Section 2 charges apply generally to refrigeration services in connection with the movement of fresh fruits and vegetables, berries, melons and processed foods whereas the Section 4 charges apply for the most part in connection with the movement of fresh meats and packinghouse products, dairy products, fish, beer and bananas and coconuts.

Hearings commenced December 9, 1953 and were concluded January 27, 1955. Voluminous evidence was submitted both by the carriers and by protestants. The carriers presented the results of a study of ice costs at 1678 locations on 124 railroads throughout the country and the results of an extensive traffic study embracing 13,975 shipments. The record contains 295 exhibits and 4369 pages of testimony. The issues were thoroughly considered.

The Commission delivered its findings and conclusions in a Report and Order dated January 9, 1956. It found that the total restated cost under Section 2, computing return on investment at only 4%, was 23.9 percent in excess of applicable revenue (297 I.C.C. 505, 527-528, 543) and determined a restated ice cost under Section 4 which is approximately 17 percent in excess of indicated revenue.* Notwithstanding these findings, the Commission authorized an increase of only 15 percent in the basic refrigeration charges under both Sections 2 and 4, stating:

> "• • • The evidence is convincing that an increase as proposed in the total cost of transportation to the shipper of commodities under refrigeration would cause an acceleration of diversions of that traffic

* The Commission's restated total cost of ice is $33,420,109 (297 I.C.C. 505, 532). The total indicated revenue obtained by multiplying the tons of bunker and body ice by the Section 4 charges is $28,526,814 (297 I.C.C. 505, 527, 532).

from the rails, or a loss of traffic otherwise, to such an extent as to result in a substantial reduction in revenue. It appears that a substantial amount of the affected traffic could not bear the increased cost of transportation which would result from general increases in charges for refrigeration services sufficient to cover the total costs thereof." (297 I.C.C. 505, 553)

Petitions for Reconsideration were filed by appellants with the Interstate Commerce Commission on March 2, 22, 23 and 30, 1956 and were denied by the Commission in an order entered April 16, 1956.

The increased refrigeration charges authorized by the Commission were published in Supplement 27 to Perishable Protective Tariff No. 16 and became effective April 17, 1956.

Complaints seeking to have the Commission's order of January 9, 1956 annulled and set aside were filed in the District Court prior to the effective date of the increased refrigeration charges. On final hearing, the Three-Judge Court dismissed the complaints. Final decree of the Court was entered September 7, 1956.

ARGUMENT.

The final decree of the District Court is plainly correct.

Appellants present what they term "the threshold question", three questions subsidiary thereto, and six questions on the merits. None of them warrants further argument before this Court.

The Merits of the Case.

In their Statement as to Jurisdiction (p. 4), appellants assert that the threshold question presented by the appeal is whether the statutory Three-Judge Court erred in refusing to consider the merits of the case, and, acting on its erroneous view that there was no justiciable issue, in dismissing the complaint. Thus, appellants incorrectly state that the District Court failed to consider the merits of the case.

Their statement in this regard is plainly erroneous. While the District Court held, contrary to appellants' contention, that the proceeding before the Commission was a "general revenue case", and that legal principles pertinent to such a case have application, it determined that the evidence warranted the findings and conclusions of the Commission and the entry of its Order.

The District Court expressly found that the evidence relating to the traffic study *"was of a kind and quantity sufficient to permit a generalization upon which findings could be based and conclusions drawn"* (p. 11a);* that

* This, and similar figures used herein, refer to appropriate pages of the District Court's opinion attached as Appendix I to Appellants' Statement as to Jurisdiction.

the Commission's finding that any deficiency in Section 4 charges does not relieve Section 2 traffic of the responsibility of bearing the full cost of that service is *"supported by the evidence"* (p. 13a) and that the Commission's findings with respect to "a vast multitude of specific facts" and its ultimate findings with respect to the amount of the deficit sustained by the carriers from the rendition of refrigeration services and the necessity for an increase of 15 percent in refrigeration charges in order to enable the carriers to provide adequate and efficient refrigeration service *"are supported by substantial evidence and afford an adequate basis for the Commission's* conclusions" (pp. 12a-13a).

Further, the Court expressly stated that other questions posed by plaintiffs and not discussed *"have been considered and found to be without merit or inapplicable"* (p. 16a).

In the circumstances, it is plainly error for appellants to assert that the Three-Judge District Court refused to consider the merits of the case.

The Character of the Proceeding Before the Commission.

The District Court sustained appellees' position that the proceeding before the Commission was a general revenue proceeding; that the Commission's order was permissive in character; that the lawfulness of individual charges was not considered or decided; and if the increased charges as applied to appellants' particular situation can be shown to be unjust or unreasonable, their remedy is clearly by proceedings instituted under Sections 13, 15 and 16(1) of the Interstate Commerce Act (pp. 11a, 16a), citing in particular the sound and well-reasoned opinions in *Algoma Coal and Coke Company* v.

United States, 11 Fed. Sup. 487, and *Koppers Company* v. *United States*, 132 Fed. Sup. 159 (pp. 6a-7a, 14a-16a).

That the proceeding was similar to a general revenue proceeding is abundantly demonstrated by the fact that the railroads in their Petition sought a uniform nationwide increase in refrigeration charges to meet the cost of the service with a view to maintaining adequate and efficient refrigeration service; that the Commission concluded that the carriers should be permitted to increase their refrigeration charges by 15 percent to enable them, "under honest, economical and efficient management, to provide adequate refrigeration service" (297 I.C.C. 505, 554); that the Commission's order is permissive only; and that the Commission did not pass upon the lawfulness or reasonableness of individual charges for any specific type or character of refrigeration service.

These are all incidents of a general revenue proceeding. The Commission not only employed the language of Section 15a(2) of the Act (49 U.S.C. 15a(2)) in its conclusion,* but admonished the carriers, as is its practice in general revenue cases, after the increased charges became effective, to make necessary adjustments where required to eliminate "any inequities or improper relations in refrigeration charges that may have developed from changed conditions since their original establishment" (297 I.C.C. 505, 554).

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* In its opinion, the District Court inadvertently referred to the provisions of Section 15a (2) of the Interstate Commerce Act as they appeared in the Transportation Act of 1920 prior to their amendment by the Emergency Railroad Transportation Act, 1933 (p. 5a). However, the amended rule of ratemaking continues to emphasize the carriers' need of adequate revenues and the present provisions are not essentially different in this respect from those which they superseded (**Florida v. United States**, 292 U.S. 1, 6-8).

Appellants argue that the Commission's decision does not contain the reservation usually found in general revenue cases to the effect that the increases authorized are not considered as prescribed within the meaning of the decision in *Arizona Grocery Company* v. *A.T.&S.F. Ry. Co.*, 284 U.S. 370, (pp. 33-34). However, the admonition that the carriers, after the increased charges become effective, shall eliminate inequities and improper relations in charges serves the same purpose. It is similar to the admonition expressed by the Commission in the general revenue cases.* The District Court correctly said:

> "Nor does the omission of a saving clause, such as was in the order considered in *King* v. *United States, supra,* preclude the making of such applications or alter the duty of the Commission to consider and decide such applications. The right to apply and the duty to decide have been given by the Congress in Sections 13 and 15 of the Act. The Commission has not, and indeed could not, foreclose the right or renounce the duty in an order authorizing general increases in transportation rates or charges."

Appellants' assertion that the filing of an "additional" complaint with the Commission would be futile (p. 5), is not well founded.** Such complaint would be directed to the lawfulness of individual charges rather than to the validity of the general increase authorized in Docket No. 31342. Moreover, contrary to appellants'

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* See **Increased Freight Rates, 1947,** 270 I.C.C. 403, 454-455; **Increased Freight Rates 1948,** 276 I.C.C. 9, 46-47, 111-112; **Increased Freight Rates, 1951,** 281 I.C.C. 557, 637; 284 I.C.C. 589, 661.

** Appellants' use of the word "additional" is incorrect. No complaint of any character has heretofore been filed with the Commission.

contention (p. 22), reparation, if found due, may be awarded by the Commission under the provisions of Section 16(1) of the Interstate Commerce Act.

Affidavits, numbered Exhibits 2-11, inclusive, were offered by appellants in the District Court upon their request for a temporary restraining order in support of the contention that the grower or shipper who actually bears the refrigeration charges by absorption in the price of his product is unable to secure reparation through the filing of a complaint with the Commission. It is questionable whether such affidavits may properly be considered upon final disposition of the cause.* However, appellants' contention is wholly without merit.

The law (49 U.S.C. 8) contemplates that an award of reparation shall be made to the party actually damaged. *Dawson Produce Co.* v. *Florida East Coast Railway Co.*, 211 I.C.C. 125, 127-128; and the Commission has almost invariably awarded reparation where complainant, while not consignor or consignee in the ordinary and generally accepted sense, was, in substance, the true consignor or true consignee and paid the unlawful charges to the carriers or ultimately bore them as such. *Alemite Corporation* v. *Baltimore & Ohio R.R. Co.*, 203 I.C.C. 265, 268.**

* These **ex parte** affidavits were received by the District Court solely as a basis for appellants' claim of irreparable damage in support of their request for a temporary restraining order (Tr. p. 12). They were part of the record only for that purpose. **Gibbs v. Bush**, 307 U.S. 66, 76.

** Consignors who actually bear the charges have a superior right to reparation and will prevail in any contest with the consignees who merely pay them. **Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel and Iron Company**, 269 U.S. 217, 237-238. They may intervene in proceedings brought by consignees to protect their interests or they may claim reparation in independent proceedings on their own account. **Adams v. Mills**, 286 U.S. 397, 408-409. Furthermore, shippers who do not pay but ultimately bear the freight charges

Decisions of the Supreme Court cited by appellants (pp. 30-35) are not pertinent to the issue here involved. In *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U.S. 671, *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, and *Secretary of Agriculture* v. *United States*, 347 U.S. 645, the Court had under consideration the lawfulness of individual rates and charges rather than the lawfulness of a general increase in rates and charges designed to provide revenues sufficient for the maintenance of adequate and efficient railroad service pursuant to the provisions of Section 15a (2) of the Interstate Commerce Act. Manifestly, also, appellants' opportunity for judicial review was not here prevented by the wording of the Commission's order as was alleged in *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U.S. 498, and *Dixie Carriers* v. *United States*, 143 Fed. Sup. 844. As previously pointed out, the District Court actually reviewed the evidence, and findings and conclusions of the Commission.

The Validity of the Traffic Study.

Appellees made a most comprehensive traffic study. It involved 13,975 shipments between the principal origin and destination areas where the heaviest volume of traffic occurs.* The Commission made a painstaking and thorough analysis of the carriers' traffic study and concluded that "the computed costs of performing the refrigeration service required in the movement of the selected ship-

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may protect their claim to reparation by taking assignments from the consignees who pay the charges. **Spiller v. A. T. & S. F. Ry. Co.**, 253 U.S. 117, 135, or by obtaining stipulation to the effect that any award of reparation shall accrue to them. **American Sand & Gravel Co. v. Chicago & N. W. Ry. Co.**, 148 I.C.C. 343, 346.

* Traffic studies deemed typical of the whole rate structure have been approved by the Supreme Court. **New England Divisions Case**, 261 U.S. 184, 197-199; **King v. United States**, 344 U.S. 254, 275-276.

ments do not overstate the average costs for the traffic as a whole" (297 I.C.C. 505, 511-521). The Three-Judge District Court examined the evidence relating to the traffic study and said:

> "The methods used in the study are recited at length and in detail in the Report of the Commission. They need not be set forth here. It is enough that we say that the evidence submitted was of a kind and quantity sufficient to permit a generalization upon which findings could be based and conclusions drawn" (p. 11a).

(a) *Representative Character of Traffic Study*

Because the study was limited to shipments between the principal origin and destination areas, it did not embrace shipments between origin and destination areas where a lesser volume of movement occurs. For this reason the Commission stated that the study "afforded no mathematical chance for all of the railroads, all origin and destination areas, and all of the affected traffic to be included, and may have rendered it unrepresentative as to the whole body of traffic" (p. 523). However, the Commission concluded that the composition of the traffic study in this respect reduced rather than overstated the traffic costs as a whole, saying:

> "The origin and destination areas selected produce and consume, respectively, a majority of all fruits and vegetables shipped, and a great preponderance of the movement of that traffic is over a relatively few routes. *This concentration of movement and the resulting heavier volume of icing operations tend to produce lower unit costs than prevail in connection with the traffic to, from, or between the excluded areas where the volume of movement is much less.*" (p. 521). (Italics supplied.)

Appellants contend that the Commission's conclusion is incorrect (p. 6). They are obviously in error. The Commission's conclusion is soundly based on abundant evidence of record which indicates that the traffic study embraces the principal movement of perishables within this country and that the unit costs of providing refrigeration service are greater in instances where a lesser movement is involved. The cost of ice is the principal element in the cost of providing Section 2 refrigeration service. It constitutes 63.3 percent of the total cost (297 I.C.C. 505, 543). And the average cost of ice included in the traffic study is $6.44 per ton whereas the average cost of all ice for the entire country, including that in the traffic study, is $6.62 per ton (Exhibit Nos. 164-166, 256). This fact alone amply confirms the Commission's finding that the unit costs in the traffic study are lower than those that would obtain if the traffic study had been expanded to include all areas of the country. Its finding in this respect is not only abundantly supported by the record but is one which the Commission by virtue of its specialized knowledge of transportation problems is peculiarly qualified to reach. In *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481, the Supreme Court stated:

> "Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission" (p. 481).

(b) *Exclusion of Rule 240, 242 and 243 Shipments*

In order that the traffic study might be completed within a reasonable length of time, it was restricted to

shipments on which bunker reicing service was performed. The refrigeration services provided under what are termed Rules 240, 242 and 243 do not require bunker reicing. Consequently, shipments which moved under these rules were excluded. However, the revenue involved is relatively minor as compared with the revenue derived from the performance of standard refrigeration and other bunker-reicing services (Tr. 893-894, 1358-1361, 1396-1403). Moreover, due to shipment in cartons rather than iced crates, lettuce, carrots and other vegetables which moved in 1951 under Rules 240 and 242 are now moved largely under standard refrigeration, a form of service completely covered in the traffic study. The Commission approved the exclusion of shipments under Rules 240, 242 and 243 from the traffic study, stating:

> "Some of the protestants object to the exclusion of the rule 240, 242 and 243 shipments from the carriers' sample, laying particular emphasis on the large number of such shipments, as indicated by the table on page 11 hereof, which approximated 43 percent of the total. Such shipments are iced initially by the shipper and are not reiced in transit. Therefore, the amount of service given them and the revenue therefrom are minor compared with bunker-reiced shipments. Although the number of excluded shipments appears large, the revenues and costs are relatively small, indicated by the petitioners to be less than 2 percent of the total.
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> "With the advent of vacuum precooling and the described changes in packaging since 1951, there has been, as herein noted, an important shift from the use of modified services to standard refrigeration from origins in Texas, Arizona, and California, tending to minimize any deficiency of the traffic sample

resulting from the exclusion of shipments not accorded reicing in transit. A notable example, is the shift from rule-242 service to standard refrigeration in the movement of lettuce and carrots from Arizona and California" (297 I.C.C. 505, 518-519).

Appellants contend that the traffic study is rendered deficient because of the exclusion of shipments not bunker reiced (pp. 5-6, 19-21). Their contention is wholly unsound. Shipments which did not receive bunker reicing service amounted to 43 percent of all cars involved. However, as stated by the Commission, the number of these cars is not at all representative of their relative significance. The refrigeration revenue on these shipments constitutes only a relatively small percentage of the refrigeration revenue on shipments moved under standard refrigeration and a substantial number of shipments which moved under Rules 240 and 242 in 1951 are now moving under standard refrigeration (297 I.C.C. 505, 521).

Difference in Treatment of Charges Under Section 2 and Section 4.

Section 4 charges reflect only the cost of ice and salt and the cost of switching. Section 2 charges reflect, in addition, ice haulage, supervision, bunker damage, accounting and hazard. Of these additional elements, ice haulage, supervision and bunker repairs are the most significant in amount (297 I.C.C. 505, 543).

Section 4 charges have never reflected these additional elements of expense. On the other hand, the Section 2 charges have reflected them for many years. Treatment of ice haulage and bunker repairs as a part of Section 2 charges originated in the *Arlington Heights* case in 1911 (20 I.C.C. 106, 108, 109) and inclusion of supervision as a part of Section 2 charges originated in the *Deciduous*

Fruit case in 1914 (32 I.C.C. 17, 25). In other words, these additional elements of expense have never been a part of Section 4 charges; but have been a part of Section 2 charges for more than 40 years.

In Docket 20769, 215 I.C.C. 684, 798, decided June 2, 1936, the Commission found that the additional elements of expense should be included in the charges assessed under Section 4.* However, the federal court stayed the Commission's Order requiring that these additional elements be included in the Section 4 charges, and the Commission's Order was subsequently vacated (297 I.C.C. 505, 524). As a consequence, revised Section 4 charges, without the addition of the extra elements, were published effective February 1, 1941 (Tr. 3418-3419) and have been continued in effect without the addition of such elements ever since, *i.e.*, for the past 16 years.

Appellants argue (pp. 6, 14-17 and 24-25) that exclusion of the additional elements of expense from charges under Section 4 constitutes unjust discrimination and undue preference in violation of Sections 2 and 3(1) of the Interstate Commerce Act (49 U.S.C. 2, 3(1)). Their contention in this respect is entirely invalid.

Whether discrimination or preference exists, and, if so, whether such discrimination is "unjust" or preference "undue" are questions of fact committed by Congress to the Commission for determination. *United States* v. *Chicago Heights Trucking Company*, 310 U.S. 344, 352-353; *Board of Trade* v. *United States*, 314 U.S. 534, 546;

* In Docket 20769, 215 I.C.C. 684, 798, the Commission ordered the addition of the elements in question to the charges under Section 4 in order to prevent violation of section 1 of the Interstate Commerce Act. It did not predicate such action upon any theory that the additional elements should be added to the Section 4 charges in order to prevent discrimination.

and *Lynchburg Traffic Bureau* v. *United States,* 84 Fed. Sup. 1012, 1016-1017, affirmed *per curiam,* 338 U.S. 864, 901.

The record contains no evidence of a competitive relation between Section 2 and Section 4 shippers upon which a finding of unjust discrimination or undue preference could be based. It shows that an entirely different group of commodities moves under Section 2 than under Section 4, and that the primary Section 2 traffic, such as fruits and vegetables, originates at points which geographically vary from those at which the principal Section 4 traffic, such as fresh meats, originates (Tr. 19, 1383-1389, 2697, 3005, 3306, 3688).

The different treatment of charges under Sections 2 and 4 has existed for more than 40 years. Yet, there is no evidence of injury sustained by Section 2 shippers by way of loss of sales or markets or any evidence that the meat and dairy interests who ship their products under Section 4 have the capacity to fix the prices for fruits and vegetables shipped under Section 2 by reason of any difference in the construction of charges under Section 2 and Section 4. With this situation in mind, the Commission correctly concluded:

> "Concerning the allegation of discrimination, it is noted that the section-2 and section-4 charges do not apply on like traffic, and that, as to the alleged undue prejudice, there is no showing that any failure of the section-4 charges to cover the above-mentioned elements has caused, or is likely to cause, any disadvantage or injury to the section-2 traffic or any shippers thereof. Thus, the claim of unjust discrimination or undue preference is not soundly based. In these circumstances, any existing deficiency in the section-4 charges does not relieve section-2 traffic of the responsibility of bearing the full cost of that service

and is not a consideration in the determination of the lawfulness of the increase proposed in the section-2 charges" (297 I.C.C. 505, 524).

The District Court stated that such discrimination as exists was not caused by the Commission's order assailed herein. But, it did not find that such discrimination exists, specifically stating "this we do not decide" (p. 13a). Moreover, it declared that "differences in rates and charges as affecting different classes of non-competing shippers or consignees are not *per se* unjustly discriminatory" and "We find ourselves in accord with the Commission's position" (p. 13a).*

Uniform Percentage Revision.

Appellants challenge the lawfulness of a uniform nationwide increase in all charges for refrigeration service in view of the variation between revenues and costs for different types of refrigeration services (pp. 5, 17-18).

Appellees submit that the Commission's treatment of the matter is entirely sound. Uniform nationwide percent-

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* Appellants state that the Commission authorized an increase of 15 percent in the varying Section 2 charges for salt whereas it authorized an increase of only 5 percent in the Section 4 charges for salt (p. 16) and that in restating costs of Section 2 services, it used an increase of 146 percent in the switching cost factor although it authorized an increase of only 15 percent in the Section 4 switching charges (p. 17).

Appellants compare unlike items. The varying Section 2 charges where different quantities of salt are used are designed to cover the cost of the additional ice required on account of meltage caused by the presence of the salt and not solely the cost of the salt. Moreoever, the increase in the switching cost factor actually reflected in the increased Section 2 charges is 15 percent of the amount included in the prior charges for switching—not the 146 percent cost factor used in the computation of the 23.9 percent loss incurred in icing Section 2 traffic.

age increases were authorized in *Increased Railway Rates, Fares and Charges, 1946,* 266 I.C.C. 537, 600-602, and *Increased Freight Rates, 1947,* 270 I.C.C. 403, 461. As the Commission pointed out in *Charges for Protective Service to Perishable Freight,* 215 I.C.C. 684, 730,

> "the handling of refrigerated traffic should be considered as an integrated national service, and when so considered, it is clear that charges should be fitted to its support and maintenance as a whole."

The application of a nationwide uniform percentage increase in determining charges for refrigeration service merely represents an extension of the practice approved by the Commission in Docket 20769, 215 I.C.C. 684, 721, 731, 750, 760, 770, when it placed haulage cost, bunker repairs, and station and auditor's accounting on a national basis, ice costs on a territorial group basis, and switching charges and supervision costs on a regional basis in order to promote uniformity in charges and to preserve competitive relationships. Salt cost also has long been established on a national basis. Practically all elements of cost, therefore, are already predicated on a national, territorial or regional basis. In *Charges for Protective Service to Perishable Freight,* 241 I.C.C. 503, 529, the Commission explained the reason for such treatment, stating:

> "The spreading of the aggregate cost of this switching service over the total number of shipments under refrigeration by means of a specific charge per icing promotes uniformity of charges among both shippers and carriers. It is in no wise different in theory from the practice whereby the charge per ton of ice is made uniform throughout a wide territory, although the actual cost per ton at one icing station is rarely the same as the actual cost at another and in many instances the difference is pronounced. This practice

> has obtained for many years, was recognized as proper in the prior report herein, and has not been attacked. The same principle is involved in group line-haul rates, where it frequently happens that hundreds of miles less transportation will be given the shipments of one consignor than of another for the same rate. As late as our report in *General Commodity Rate Increases, 1937,* 223 I.C.C. 657, 743, we cited *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U.S. 456, in support of the principle that 'an individual shipper, because of his interest in the adequate maintenance of "all the railroads necessary to do the business of a rate territory or section"', *could not complain of a general level of rates higher than would be reasonable considering the immediate service rendered to him alone."* (Emphasis supplied.) (p. 529).

Appellants or members of organizations represented by them ship perishable commodities from California, Arizona and Florida. It is highly significant that these shippers, commodity by commodity, will not suffer any detriment from the assessment of the uniform increase of 15 percent authorized by the Commission. A large number of the different refrigeration services under Section 2 are utilized by shippers from these states in each commodity group. While there is some variation in cost versus revenue in the case of the different services, shippers in each commodity group use a considerable number of the different services, and when all the services used are aggregated, no commodity group will be required to pay refrigeration charge increases in excess of the loss incurred by the carriers. This is easily demonstrated.

The Commission's restatement of costs effects a reduction of 19.8 percent in the percentage of loss claimed by the carriers (29.8 percent versus 23.9 percent). Application of this reduction to the information shown in Exhibit

No. 168 produces percentages of loss varying from 15.39% to 62.43% on the principal commodities shipped from California-Arizona and Florida.*

When it is considered that these percentages of loss are based upon 1951 experience, it is evident that shippers in the principal commodity groups in the producing areas represented by appellants have received extremely generous treatment in the application of an increase in charges of only 15 percent.

Ice Costs and Charges on Territorial Group Basis.

In their proposal, the carriers observed the identical territorial ice-cost groups approved by the Commission in *Charges for Protective Service to Perishable Freight,* 215 I.C.C. 684. The Commission approved continuance of these same groups for the future. Finding 1 and Appendix A (297 I.C.C. 505, 554, 556-557). Apparently, appellees criticize continued observance of these groups in disregard of ice costs at individual icing stations and in the particular state where the ice is furnished (pp. 16-17, 19-20). Neither of these criticisms is well-founded.

The practical necessity of publishing charges on a group basis rather than by states or individual icing stations has always been recognized by the Commission. In its decision in *Charges for Protective Service to Perishable Freight,*

---

*

Commodity	California-Arizona Cars†	California-Arizona Percent of Loss	Florida Cars†	Florida Percent of Loss
Melons	1819	16.59	.....	.....
Deciduous Fruits	2480	16.35	.....	.....
Vegetables	390	18.96		
Tomatoes	126	15.83	1742	15.39
Potatoes	978	45.63		
Citrus	2197	22.52	1534	25.48
Frozen Foods	256	62.43	144	53.57
All Commodities	8266	22.38	3436	22.58

†Exhibit 167

215 I.C.C. 684, 731, the Commission pointed out that the groupings were arranged with a view of equalizing the costs over the respective routes as far as practical, and stated that "it is especially desirable that the costs over the respective routes shall be as nearly equal as practicable"; and, in *Growers & Shippers League of Florida* v. *Atlantic Coast Line R.R. Co.*, 238 I.C.C. 481, 491, it stated that "uniform charges are necessary to enable growers and shippers within wide producing areas to place their shipments in large consuming markets on equal terms * * *." From at least as far back as the publication of the first perishable protective tariff in 1920, the charges for ice have been uniform throughout large areas (238 I.C.C. 481, 491).

The group principle of ratemaking has long been approved by the Commission and sustained by the courts. In *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 486, this Court held:

> "Treating an area as a unit and applying a uniform blanket or group rate within it, as is the common practice with respect to switching rates, is within the competence of the Commission."

See, also, *Lynchburg Traffic Bureau* v. *United States*, 84 Fed. 1012, 1015, affirmed *per curiam*, 338 U.S. 864.

The circumstance that the Commission's restated ice costs in certain origin groups, namely, California, Texas and Florida, are less than 15 percent in excess of Section 4 charges, as pointed out by appellants (pp. 16-17), is not significant. The predominant movement of perishables from these states consists of shipments of fruits and vegetables under Section 2 of the tariff* and the Commission's restated ice costs in the various groups traversed,

* During 1953, from Florida, 66,496 cars originated under Section 2 and only 258 cars under Section 4 (Tr. 3005). Only 875 digit 5 (traffic study) cars out of a total of 24,466 digit 5 (traffic study) cars or only 3.6 percent moved under Section 4 from the States of California, Arizona, Colorado, Idaho, Oregon, Texas, Utah and Washington on the contract lines of the Pacific Fruit Express Company in 1951 (Tr. 2697).

including the origin groups, are used in determining the excess of cost over revenue in the case of shipments under that section. The Section 2 shipments also traverse and terminate in higher-cost groups where the Commission's restated costs exceed charges by more than 15 percent (297 I.C.C. 505, 527, 532, 557). The important factor is the aggregate of costs over revenues for the entire movement.

So far as charges under Section 4 are concerned, the fact that the Commission's restated ice costs are less than 15 percent in excess of charges in the origin groups in question is compensated by the fact that both contract and manufacturing costs of ice have substantially increased since 1951, the date as of which the restated costs were determined (Exhibit No. 169; Tr. 3168; 297 I.C.C. 505, 532). The contract cost of ice alone increased 10.3 percent between 1951 and August 1, 1954 (Exhibit No. 169).

Appellees respectfully submit, therefore, that appellants present no substantial questions for the decision of this Court, and that the final decree of the Three-Judge District Court should be affirmed.

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January, 1957

PROOF OF SERVICE.

I, Roland J. Lehman, Counsel of Record for Railroad Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 24th day of January, 1957, I served copies of the foregoing Motion to Affirm on the several parties to the case as follows:

On plaintiffs-appellants and intervening plaintiffs-appellants, by mailing a copy in a duly addressed envelope with air mail postage prepaid to their attorney of record, M. W. Wells, 135 Wall Street, Orlando, Florida.

On Florida Railroad and Public Utilities Commission, by mailing copies in duly addressed envelopes with air mail postage prepaid to Lewis W. Petteway, General Counsel, and R. Y. Patterson, Jr., Assistant General Counsel, Tallahassee, Florida.

On the Florida Citrus Commission, Growers and Shippers League of Florida, Florida Canners Association, Florida Citrus Mutual, Florida Fruit and Vegetable Association, Chase and Company, and A. Duda & Sons Cooperative Association, by mailing copies in duly addressed envelopes with air mail postage prepaid to M. W. Wells, 135 Wall Street, Orlando, Florida.

On the California Citrus League, by mailing a copy in a duly addressed envelope with air mail postage prepaid to Karl D. Loos, Munsey Building, Washington 4, D. C.

On the Western Growers Association, by mailing copies in duly addressed envelopes with air mail postage prepaid to Frank C. Brooks and Hugh T. Matthews, Jr., 305 Empire Bank Building, Dallas, Texas.

On the U.S. Department of Agriculture, by mailing copies in duly addressed envelopes with air mail postage prepaid to Paul E. Blanchard and Walter D. Matson, Office of the General Counsel, U. S. Department of Agriculture, Washington, D. C.

On the United States of America, by mailing copies in duly addressed envelopes with air mail postage prepaid to the Solicitor General, Washington 25, D. C.; John H. D. Wigger, Department of Justice, Washington 25, D. C.; and Harold Carlswell, United States Attorney, Tallahassee, Florida.

On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with air mail postage prepaid to Robert W. Ginnane, General Counsel, and Charlie H. Johns, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

.....

ROLAND J. LEHMAN

APPENDIX A.

The Railroad Defendants-Appellees Are as Follows:

Atlantic Coast Line Railroad Company
Florida East Coast Railway Company
(John W. Martin, Trustee)
Seaboard Air Line Railroad Company
W. T. Jamison, Chairman and Agent, National Perishable Freight Committee

The Railroad Intervening Defendants-Appellees Are as Follows:

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Chesapeake and Ohio Railway Company
Chicago and North Western Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Erie Railroad Company
Great Northern Railway Company
Illinois Central Railroad Company
Louisville and Nashville Railroad Company
Missouri Pacific Railroad Company
The New York Central Railroad Company
The New York, Chicago and St. Louis Railroad Company
The New York, New Haven and Hartford Railroad Company
Northern Pacific Railway Company
The Pennsylvania Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company
Union Pacific Railroad Company
Wabash Railroad Company
The Western Pacific Railroad Company

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 663

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, CALIFORNIA CITRUS LEAGUE, WESTERN GROWERS ASSOCIATION, ET AL., *Plaintiffs-Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ARMOUR AND COMPANY, ET AL., *Defendants-Appellees*.

Appeal from the United States District Court for the Northern District of Florida

MOTION OF ARMOUR AND COMPANY, ET AL., TO AFFIRM

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January 26, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ARMOUR AND COMPANY, ET AL., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Florida

MOTION OF ARMOUR AND COMPANY, ET AL., TO AFFIRM

These appellees, Armour and Company, The Cudahy Packing Company, George A. Hormel & Company, Kingan & Company, Oscar Mayer & Company, John Morrell & Company, The Rath Packing Company, Swift & Company, and Wilson & Company, received on December 31, 1956, appellants' Statement as to Jurisdiction in the above-entitled case.

In accordance with rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court of the United States, appellees move that the judgment of the District Court

be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

Appellees intervened in the District Court proceeding solely to defend against appellants' claim that the Commission order which is the subject of this appeal is invalid because it causes unlawful discrimination and prejudice against shippers of fruits and vegetables in favor of those who ship fresh meats and packing house products and dairy products. In this motion to affirm, appellees confine their consideration of appellants' attack on the validity of the Commission's order to that ground. The District Court held that ground to be without validity.

STATEMENT

This is a direct appeal from a judgment of a district court (three Judges sitting) which sustained an order entered by the Interstate Commerce Commission in a proceeding entitled *Proposed Increased Refrigeration Charges*, Docket No. 31342, 297 I.C.C. 505. In and by that order, the Commission authorized, with certain exceptions, increases in the charges for refrigeration services published by the railroads in a tariff known as the Perishable Protective Tariff. The circumstances which give rise to the alleged ground for invalidity of the order which appellees resist are as follows:

A complete refrigeration service involves six principal elements of service which are (1) the ice placed in bunkers of refrigerator cars, (2) the salt added to the ice, (3) the service of switching cars to ice houses, (4) the haulage of the tare weight of the ice, (5) the supervision of the services, and (6) the station and auditor's accounting required in the performance of the refrigeration services.

The Perishable Protective Tariff is published in sections. Section 2 thereof contains a schedule of charges for refrigeration services rendered on fruits and vegetables. These charges are stated in one figure per car to cover

complete refrigeration services from specified origins to specified destinations. Those charges are called "stated charges" and are designed to compensate the carriers for all six elements of the refrigeration services on what is termed herein as section-2 traffic.

In section 4 of the tariff, refrigeration charges are published on fresh meats, packing-house products, dairy products, and a few other commodities. These charges cover only particular elements of a complete refrigeration service, in contrast to the charges in section 2 which cover all elements. The elements of service for which charges are published in section 4 embrace only the ice furnished on the shipper's order, the salt furnished on the shipper's order, and the switching services to ice houses required in connection with the reicing which the shipper specifies en route. As to section-4 commodities, no specific charges are designated in the Perishable Protective Tariff for ice haulage, supervision, or station and auditor's accounting. As is developed later, such compensation as the carriers receive for those last named elements of refrigeration service on section-4 traffic comes to them from the line haul rates on those commodities.

The Commission proceeding arose upon the petition of railroads for authority to increase the particular charges as published in both sections 2 and 4 of the Perishable Protective Tariff. No authority was sought to increase charges not published in that tariff, or to name new charges, or to increase or diminish the elements of service covered by particular charges. The Commission authorized a 15 percent increase in the existing charges with which the case was concerned, except that the increase on salt was in cents per 100 pounds.

In the proceeding before the Commission, the appellants, who are or represent shippers of section-2 traffic, urged that the failure of the railroads to publish separate specific charges for ice haulage, supervision, and station and

auditor's accounting (hereinafter termed "ice haulage, etc.") incident to the refrigeration of section-4 commodities, discriminated against section-2 shippers. They urged that the Commission was without power to approve *any* increases in the stated charges on section-2 traffic unless and until new separate specified charges on the service elements mentioned were published in the Perishable Protective Tariff on section-4 traffic and such new charges were subjected to the same increases as might be authorized in the stated per car charges on section-2 traffic. The Commission rejected that contention and on page 524 of its report said:

> Concerning the allegation of discrimination, it is noted that the section-2 and section-4 charges do not apply on like traffic, and that, as to the alleged undue prejudice, there is no showing that any failure of the section-4 charges to cover the above-mentioned elements has caused, or is likely to cause, any disadvantage or injury to the section-2 traffic or any shippers thereof. Thus, the claim of unjust discrimination or undue preference is not soundly based. In these circumstances, any existing deficiency in the section-4 charges does not relieve section-2 traffic of the responsibility of bearing the full cost of that service and is not a consideration in the determination of the lawfulness of the increase proposed in the section-2 charges.

That finding of the Commission was asserted by appellants to be erroneous, and that was urged as a ground for setting the Commission order aside. The District Court disposed of that contention in the following paragraph of its opinion:

> It is strongly insisted by the plaintiffs that the differences in the treatment accorded by the Commission's order with respect to Section 2 charges on the one hand and Section 4 charges on the other result in unlawful discrimination against and unjust treatment of the users of Section 2 services. It is true that Section 4 charges reflect only the cost of ice and salt, and

the cost of switching, while Section 2 charges include also ice haulage, bunker damage, supervision and other elements. If there be any discrimination between Section 2 and Section 4 traffic, and this we do not decide, it is a discrimination which existed prior to the proceedings before the Commission whence issued the order under attack. Such discrimination, if any there be, did not result from nor was it substantially altered by the Commission's order. Whether there be an unjust discrimination is a question for the Commission. The Commission has found that the Section 2 charges and the Section 4 charges do not apply to like traffic and that no showing is made of any disadvantage or injury to Section 2 traffic or the shippers thereof. "In these circumstances", the Commission found, "any existing deficiency in the Section 4 charges does not relieve Section 2 traffic of the responsibility of bearing the full cost of that service and is not a consideration in the determination of the lawfulness of the increase proposed in the Section 2 charges". The finding is supported by the evidence. Differences in rates and charges as affecting different classes of non-competing shippers or consignees are not per se unjustly discriminatory. We find ourselves in accord with the Commission's position. See *Board of Trade* v. *United States*, 314 U.S. 534, 62 S.Ct. 366, 86 L.Ed. 432, reh. den. 315 U.S. 826, 62 S.Ct. 621, 86 L.Ed. 1222.

On page 17 of their Statement as to Jurisdiction appellants state the question with which these appellees are concerned as follows: Whether the elements for separate charges which are not specifically published in the Perishable Protective Tariff

> ". . . can lawfully be used in authorizing an increase in section 2 charges when in the same proceeding it is affirmatively shown and found by the Commission that none of the same elements (although applicable) are charged, nor any charges nor increased charges therefor proposed, against section 4 traffic."

They urge that the District Court erred in not answering in the negative the question posed and not setting the order aside.

Appellants' contention in that respect is unsound for three reasons. *One*, there can be no discrimination or undue preference at law as between unlike and noncompetitive commodities. *Two*, there is no showing of discrimination in fact in the absence of proof that compensation for all elements of the refrigeration service received by railroads from the stated charges in the case of section-2 traffic is different from the compensation for the same elements of service received when coupled with the line haul rates in the case of section-4 traffic. This difference in the mechanics of payment can in no sense be deemed unjust discrimination or to cause undue preference and prejudice. *Three*, the Commission was not called upon or required to decide, hence this Court cannot review, the question of whether refrigeration services may properly be compensated for, in part, by the line haul rates.

These matters will be dealt with in the order stated.

ARGUMENT

I.

There can be no discrimination or undue preference as between unlike and noncompetitive commodities, or in the absence of proof of injury from the alleged discriminatory charges.

The question with which this motion to affirm is concerned is posed as follows in appellants' Statement as to Jurisdiction (page 6):

> (5) Whether unlawful discrimination, contrary to sections 2 and 3 of the Interstate Commerce Act, exists or is created by a uniform percentage increase in all refrigeration charges, although "section 4" charges (on fresh meats and packing house products) are published for only three elements of cost, and "sec-

> tion 2" charges (on fresh fruits and vegetables) are based on as many as nine elements of cost.

At page 25 of the Statement as to Jurisdiction, appellants say that the Commission's order either created or increased "a discrimination which is declared unlawful by the statute".

Section 2 of the Interstate Commerce Act is limited in its application to different charges maintained as to "a like kind of traffic". Whether section-2 traffic and section-4 traffic are "like" traffic, is a question of fact. On that question the Commission ruled adversely to the appellants, saying at page 505, "the section-2 and section-4 charges do not apply on like traffic . . ." Appellants in their Statement as to Jurisdiction make no claim that there is evidence to contradict the quoted finding. Appellants' claim as to discrimination is without substance. *Barringer & Co.* v. *United States*, 319 U.S. 1, 6 (1943).

Section 3 of the Act prohibits undue preference and prejudice as between persons, localities, traffics, etc. A mere difference in rates assessed upon different traffic is not sufficient to sustain a finding of undue preference and prejudice under section 3. In addition to other essential subsidiary findings, it must appear that the preference of the one traffic causes a corresponding disadvantage or injury to the prejudiced traffic. The Commission finding as to this is explicit, it being stated at page 524 of the report as follows:

> . . . there is no showing that any failure of the section 4 charges to cover the above-mentioned elements has caused, or is likely to cause, any disadvantage or injury to the section 2 traffic or any shippers thereof. * * * In these circumstances, any existing deficiency in the section 4 charges does not relieve section 2 traffic of the responsibility of bearing the full cost of that service and is not a consideration in the determination of the lawfulness of the increase proposed in the section 2 charges.

Here, again, we find no claim in appellants' Statement as to Jurisdiction that there is evidence opposed to the Commission's findings of fact. The District Court found that that finding is supported by the evidence, as indicated by the quotation appearing on page 5 hereof.

The appellants introduced no evidence whatever in the Commission proceeding tending to show any disadvantage or injury by reason of the difference in charges complained of. The Commission's conclusion as to the absence of any section 2 or section 3 violation, proceeds inevitably from that lack of evidence. Appellants' allegations of error with respect to that finding are without either fact or legal support, and present no substantial question.

II.

There is no evidence of a difference in fact between the aggregate compensation received by railroads for refrigeration service on section-2 traffic and section-4 traffic.

Even if the appellants could successfully negotiate the hurdle of establishing that section 2 and section 4 traffic are "like" traffic and that a preference of section 4 traffic somehow causes injury to section 2 traffic, appellants would none the less founder when they attempt to demonstrate that there is, in fact, a difference between the two in the compensation received for similar refrigeration services. The bare fact that the Perishable Protective Tariff does not publish specific charges which provide compensation for ice haulage, etc., as to section 4 traffic, but does as to section 2 traffic, does not prove a *difference*. That is because of the fact that as to section 4 traffic compensation to cover such elements of expense is received from the line haul rates applicable thereto. This fact is recognized in a series of past cases before the Commission and was not challenged by any evidence to the contrary in the instant proceeding before the Commission. See *Perishable Freight Investigation*, 56 I.C.C. 449, 466-467 (entire Comm., 1920); and *Pacific States Butter, Egg, etc. Asso.* v. *Southern P. Co.*,

151 I.C.C. 244, 255 (Div. 4, 1929). In the case last cited the Commission stated at page 255:

> The rates which we have prescribed for dairy products in Official Territory, within and from the southwest, and in other parts of the country east of the Rocky Mountains have been fixed in recognition of the cost-of-ice basis and of the fact that it does not in itself provide compensation for all elements of refrigeration service.

An example of predicating line haul rates on section-4 traffic on certain of the elements of the refrigeration service is *Morrell & Co.* v. *N.Y.C. R.R. Co.*, 104 I.C.C. 104 (entire Comm., 1925), 120 I.C.C 537 (1927) The line haul rate level prescribed in that case constitutes the foundation for the rates on which the preponderance of the fresh meat and packing house traffic presently moves to eastern territory. The report in that case shows that consideration was given the cost of ice-haulage. (See page 116) On page 122 the Commission considered as "entitled to some weight in determining reasonable [line haul] charges" on fresh meat and packing house products the fact that the "rules governing and charges for icing meats . . . [were] more favorable than on other perishable freight".

To the extent that the line haul charges applicable to fresh meat and packing house products have included provision for ice haulage and other refrigeration expenses, it is significant to note that such charges have been increased 88.4 percent since June 30, 1946 (see *Increased Freight Rates, 1956*, 298 I.C.C. 279, 325) while the charges specified in the Perishable Protective Tariff have been subjected to increases of but 32.25 percent (since no increases on such charges were allowed in Ex Parte Nos. 168 or 175).

In *Charges for Protective Service to Perishable Freight*, 215 I.C.C. 684, the Commission did find that it would be proper and lawful to provide in the Perishable Protective Tariff new separately published charges on section-4 traffic

for ice haulage, etc. However, in those reports the Commission recognized that to the extent such charges duplicated compensation provided in the line haul rates, shippers were entitled in an appropriate proceeding to a readjustment to remove the double charge. (215 I.C.C. 797, 241 I.C.C. 503, 241 I.C.C. 515, 253 I.C.C. 531) The validity of those orders was challenged by the packers because the Commission was without power to prescribe proper charges without at the same time making proper adjustment of the line haul rates. The orders in those cases never became effective. First, there was a temporary restraining order, then a postponement at the request of the Office of Price Administration, and finally in 1951 a complete vacation of the order of the Commission upon a recital of changed conditions. As a result, the practice as to section-4 traffic of compensation for ice-haulage, etc., being provided by the line haul rates has never been changed.

In summary, the Commission has uniformly recognized the inclusion in the line haul rates applicable to section-4 traffic of provision for some of the cost of furnishing refrigeration service. Amounts so included have never been specifically determined in any Commission proceeding. Appellants in the instant proceeding introduced no evidence whatever as to that amount, and consequently are wholly unable to establish a difference *in refrigeration charges* as between section-2 and section-4 traffic. Failing in this, the allegations of discrimination and undue preference under sections 2 and 3 of the Interstate Commerce Act are without factual or legal justification.

III.

The Commission was not called upon or required to decide, hence this Court cannot review, the question whether refrigeration services may be compensated for in part by the line haul rates.

All that was before the Commission in the proceeding under review was the lawfulness of certain proposed increases in the various refrigeration charges as specifically

carried in the Perishable Protective Tariff. The Commission was not called upon to determine the lawfulness of providing compensation for the furnishing of part of the refrigeration service out of line haul rates, nor the sufficiency of the amounts so provided for. Consistent with the nature of the proceeding, no evidence whatever was introduced by any party, not even appellants, bearing upon those matters. If the scope of the investigation had included those matters, i.e., if the railroads had proposed to establish separately-designated refrigeration charges for elements of cost theretofore provided for only out of the line haul rates, evidence as to the level of such line haul rates would have been essential to a determination of the lawfulness of such newly published tariff items. In *Perishable Freight Investigation*, 56 I.C.C. 449, 612 (entire Comm., 1920), the Commission held that where such newly published items were proposed, no determination could be had with respect thereto "in default of evidence in regard to the quantum of the line-haul rates". In *Barringer & Co.* v. *United States, supra*, this Court held that the Commission properly considered the level of the through line haul rates in determining whether a related accessorial charge was just and reasonable under section 1 of the Act.

The different method of assessing charges for refrigeration services as between section-2 and section-4 traffic was a practice antedating by many years the institution of the investigation here under review. In footnote 2 on page 7 of their Statement as to Jurisdiction appellants cite a case decided in 1920 (*Perishable Freight Investigation*, 56 I.C.C. 449) where this practice, which was then in effect, was described. Particularly significant is the fact that in Ex Parte No. 162, *Increased Railway Rates, Fares, and Charges, 1946*, 266 I.C.C. 537 (1947), and again in Ex Parte No. 166, *Increased Freight Rates, 1947*, 270 I.C.C. 403 (1948), the Commission approved in each proceeding increases in refrigeration charges of 15% on both section-2 and section-4

traffic, exactly the percentage approved here, and no one questioned its authority in those cases. If section-2 shippers consider themselves aggrieved by that difference in manner of publication, they are now, and have been for many years free to bring a complaint proceeding alleging violation of sections 2 and 3 and of any other section of the Interstate Commerce Act. Such a complaint would present squarely the question which appellants seek to have decided in the first instance by this Court in the absence of a determination by the Commission itself in a proceeding embracing that issue. This Court may not properly assume unto itself the authority to determine a question not presented in the issues before the Commission as to which there is no testimony offered and which the Commission has not decided. The initial determination of whether unjust discrimination or undue preference and prejudice exists is committed by Congress to the Commission. In a proper case in which a determination is reached based upon competent evidence of record, this Court would within certain limits pass upon the validity of such determination as the Commission might render. This, however, is not such a case.

CONCLUSION

Appellees respectfully submit that the appellants present no substantial question with respect to their allegation of discrimination and prejudice for decision by this Court, and that the judgment and decree of the District Court should therefore be affirmed.

Respectfully submitted,

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January 26, 1957